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Supreme Court of the United States

OCTOBER TERM, 1945

No. 970

ABRAHAM FISHGOLD,
Plaintiff-Appellant,

vs.

SULLIVAN DRY DOCK & REPAIR CORPORATION,
Defendant-Appellee,

ROY GRANATA, as Acting President and Acting Treasurer of Local 13, Industrial Union of Marine and Shipbuilding Workers of America, C. I. O.,
Intervenor-Appellee.

BRIEF OF DEFENDANT-APPELLEE

J. READ SMITH,
Counsel for Defendant-Appellee.

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Opinion Below

The majority and dissenting opinions in the United States Circuit Court of Appeals, Second Circuit (R. 181-195), are not yet reported.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered March 4, 1946 (R. 195).

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by Act of February 13, 1925.

The jurisdiction of the United States District Court, which rendered the judgment from which the appeal was taken, was conferred by Section 8(e) of the Selective Training and Service Act of 1940 as amended (Public Law 360, 77 Congress, U. S. Code, Title 50, War App. Sections 301-318).

Question Presented

The question before the Court is the construction of certain provisions of the Selective Training and Service Act of 1940, as amended.

The specific question at issue may be stated as follows:

Whether the Selective Training and Service Act of 1940, as amended, guarantees to a returning veteran, who has been restored to his former job, after satisfactory completion of his service in the armed forces and discharge therefrom, the right to hold that job for a period of one year even though to do so must result in the displacement of a non-veteran having greater length of service in the plant of their employment.

Statute Involved

The applicable provisions of the Selective Training and Service Act of 1940, as amended.

Statement

The plaintiff, a welder, was employed by the defendant Sullivan Dry Dock & Repair Corporation on December 21, 1942, and was steadily employed until May 22, 1943, when

he was inducted into the Army of the United States, under the provisions of the Selective Training and Service Act of 1940, as amended.

He was honorably discharged and received a certificate of satisfactory completion of his period of training and service on July 12, 1944 (R. 55-57).

The defendant restored him to his former position, in its employ, on August 21, 1944, which was within forty days after his discharge, in compliance with the condition of the Act (R. 57). Thereafter, because of a decrease in the amount of work available, the plaintiff was "shaped-up" on nine separate days, during April and May of 1945 (R. 60, 61).

On the aforesaid days there was not sufficient welding work available at the defendant's plant to occupy all hands. On these days defendant was required and did give preference to other welders, not veterans of World War II, who had higher shop seniority than the plaintiff.

Prior to this action the intervenor notified the defendant that it objected to the employment of plaintiff "out of his seniority position" while men of greater length of service were not put to work (R. 152). A non-veteran had been "shaped-up" whereas the plaintiff had been permitted to work (R. 70, 71, 73). This non-veteran had greater length of service than the plaintiff, whereupon the intervenor protested to the defendant, but the defendant retained the plaintiff at work in preference to the non-veteran. The matter was then submitted to an arbitrator appointed by the National War Labor Board. The arbitrator decided in favor of the non-veteran, holding that he should not have been laid off in order to provide work for the plaintiff (R. 21, 74, 75).

After this decision, the plaintiff was laid off on the days specified and the non-veteran was put to work in his place. Plaintiff subsequently commenced this action for loss of wages suffered by him by reason of defendant's action in shaping him up on nine days prior to the expiration of one year from the date of his restoration to his former position.

He also asked for a declaratory judgment that the defendant be required to continue him in its steady employment for a period of one year from August 25, 1944. The issues were tried in the United States District Court for the Eastern District of New York before Judge Matthew T. Abruzzo on August 26 and August 29, 1945.

A decision was rendered on August 30, 1945, in favor of plaintiff for a money judgment in the amount of $86.40 based upon his loss of wages for nine days.

Plaintiff's request for declaratory judgment, however, was denied because a year from the date of plaintiff's employment had already expired and that period was the limitation of time covered by the statute (R. 150).

The judgment was appealed from to the United States Circuit Court of Appeals for the Second Circuit, where it was argued on February 5, 1946, and a decision was rendered March 4, 1946, reversing the judgment and dismissing the complaint.

The majority opinion was written by Circuit Judge Learned Hand and Judge Harrie B. Chase wrote a dissenting opinion. Judge Jerome N. Frank, the third member of the Court, concurred with Judge Hand.

Position of Defendant-Appellee

The position of the defendant, Sullivan Dry Dock & Repair Corporation, is somewhat different than that usually assumed by defendants in litigation (R. 52, 53). Although it is vitally interested in a final and unequivocal decision of this perplexing and important question, it has not, nor does it now, attempt to side with the veteran involved or with the union.

Throughout this case, it has acted more in the nature of *amicus curiae* than a militant defendant. A casual examination of the record will indicate that it went to great lengths in order to assist not only the Court but the plaintiff and intervening union local in presenting all necessary

and pertinent data upon which to base a final conclusion. Indeed, this fact was commented upon by the Trial Judge (R. 147).

The defendant in its answer (R. 8-26) set forth the entire history of the dispute. It also produced every witness with the exception of the plaintiff himself who testified at the trial.

Although against the defendant, the judgment of the Trial Court was appealed to the Circuit Court of Appeals by the intervenor and not by the defendant (R. 176, 177).

The defendant is well aware of the divided opinion in the District Courts wherein decisions have thus far been recorded (*Whirls* v. *Trail Mobile Company* [D. C. S. D. Ohio]; *Olin Industries, Inc.* v. *Barnett* [D. S. C. D. Ill.]), and also of the speed with which the veterans of World War II are returning to their former positions of employment. It is aware also of its own personal circumstances with the attendant problems brought on by this question and it is, of course, quite obvious that almost every other employer throughout the nation is in a similar position.

Conclusion

For the reasons stated, it is respectfully requested that this Honorable Court render a decision finally settling for all concerned this important question.

Respectfully submitted,

J. Read Smith,
Counsel for Defendant-Appellee.